APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

GUY ADAMS, BONNIE L. ADAMS, TIMOTHY ADAMS, CLIFTON ALBRIGHT, JANET ALLOT, *et al.*, MARVIN KLEIN, MARY LOU MILLER, DWIGHT W. WILLIAMS, JO ANN PETERSON, IGNACIA FUENTES, RUSSEL PETERSON, JANET PETERSON, CENTRAL LIFE ASSURANCE CO.,

Plaintiffs-Appellants,

v.

BURLINGTON NORTHERN RAILROAD COMPANY, a Delaware Corporation, BURLINGTON NORTHERN, INC., a Delaware Corporation,

Defendants-Appellees.

GUY D. ADAMS, HERB BAILEY, BARNTS MEDICAL SPECIALTIES, BENEFIT TRUST LIFE INSURANCE CO., TOM BRADLEY, DONALD L. BROOKHART, CENTRAL LIFE ASSURANCE CO., RUSSELL L. CLARK, DMN, INC., RAY EIFORD, SHERMAN A. HILL, BRYCE A. JAMES, FRANK C. JONES, ALAN RUSSELL KAHN, ROBERT M. KEENHOLTS, MANHATTAN LIFE INSURANCE COMPANY, STANDARD INSURANCE COMPANY, ELLIS R. STANLEY, TRUSTMARK LIFE INSURANCE COMPANY, UNION CENTRAL LIFE INSURANCE CO., IRENE E. WALTERS, WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY, JOHN H. ZYBURA, for their own behalf and on behalf of and as Class representatives of all other persons similarly situated,

Plaintiffs-Appellants,

v.

CSX TRANSPORTATION, a Virginia corporation,

Defendant-Appellee.

Nos. 94-35461, 94-35618

Argued and Submitted Sept. 14, 1995

Decided April 10, 1996

Camden M. Hall, Foster Pepper & Shefelman, Seattle, Washington, Geoffrey P. Knudsen, Ann Mary Holmes, Donald B. Myers, Stoel, Rives, Boley, Jones & Grey, Seattle, Washington, for plaintiffs-appellants.

Robert D. Joffe, Cravath, Swaine & Moore, New York City, Bruce D. Corker, Seattle, Washington; R. Harvey Chappell, Jr., Paul W. Jacobs, II, J. Tracy Walker, IV, Christian, Barton, Epps, Brent & Chappell, Richmond, Virginia, for defendants-appellees.

Appeals from the United States District Court Western District of Washington; William L. Dwyer, District Judge, Presiding, No. CV-93-01590-WLD, John J. Coughenour, District Judge, Presiding, No. CV-93-1827-JCC.

Before ALARCON and CANBY, Circuit Judges, and FITZGERALD,* District Judge.

CANBY, Circuit Judge:

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* The Honorable James M. Fitzgerald, Senior United States District Judge for the District of Alaska, sitting by designation.

These cases arise from the efforts of bondholders to enforce "gold clauses" in railroad bonds issued almost a century ago. A gold clause requires payment of the bond's obligations in gold dollars valued at the time the obligation was undertaken. In 1933, Congress rendered such gold clauses unenforceable, 48 Stat. 112, 113 (1933), but then permitted them again in 1977, 91 Stat. 1227, 1229 (1977). The issues presented here are whether the 1977 legislation revived these ancient gold clauses, and whether various actions of the parties have created new, post-1977 obligations payable in gold. Our answer to both questions is "no."

The bondholders brought a class action to force the Burlington Northern Railroad Company ("Burlington Northern" or "Railroad") to pay the interest and principal of its gold bonds, issued in 1896 and 1921, in gold coin. Class representative Guy Adams appeals the district court's dismissal of the action under Fed. R. Civ. P. 12(b)(6) and 56. Because of the identity of issues in this case and *Adams v. CSX Transportation, Inc.*, No. 94-35618, an appeal from the district court's dismissal of a class action to enforce the gold clauses in CSX Transportation ("CSX") bonds, we consolidate the cases for purposes of this opinion. This Court has jurisdiction under 28 U.S.C. § 1291. We affirm the decisions of the district court in both cases.

BACKGROUND

In 1896 and 1921, respectively, the Northern Pacific Railway and the Great Northern Railway Company issued millions of dollars in "Gold Bonds" to finance their expansion in the Midwestern and Northwestern states. The bonds each contain a "gold clause," requiring the obligor to pay upon maturity "the [face value number of] Dollars, *gold coin* of the United States of America *of the present* [1896 or 1921] *standard weight and fineness*." The clause also calls for annual interest payments at a rate of between three and four per

cent, depending on the issue, to be made "in like gold coin."

Nearly $92 million of the Northern Pacific bonds and approximately $62 million of the Great Northern bonds remain outstanding. The bonds mature between January 1, 1997 and January 1, 2047. The Burlington Northern became obligor on these bonds in 1970, when Great Northern and Northern Pacific merged into it. Both issues trade on the major exchanges, at prices reflecting the market's belief that the Burlington Northern will continue to pay its obligations in current legal tender, rather than in gold coin of the relevant period. If the method of payment were to return to gold coin, the value of the bonds would increase by up to 2000 per cent.

Since the time the Burlington Northern became the obligor on the bonds, it has undergone a corporation reorganization, in which its name was changed, and several mergers. When it reorganized to effectuate a name change and to create a holding company, the Burlington Northern undertook a Supplemental Indenture under its new name "to authorize the unbroken continuity" of the Railroad's obligations to the bondholders.

After a 1981 merger with the Colorado & Southern Railway, the Railroad undertook another Supplemental Indenture. The Supplemental Indenture subjected the former assets of Colorado & Southern to a lien that the Railroad's mortgage trustee had been required to maintain on certain blocks of stock in order to secure payment on the bonds. The Railroad wanted to free the stock from the lien so that it could cancel the stock. The Railroad issued several other Supplemental Indentures, for the same purpose, after other subsequent mergers. None of the Supplemental Indentures created new debt.

In 1985, the Railroad sought the mortgage trustee's release of its lienhold on 1.9 million acres of

undeveloped property that had previously served as partial security for the bond debt. A class of gold bondholders filed an action, with Alan Reivman as class representative, to prevent the lienhold release. In 1987, the Railroad negotiated a settlement with the bondholders (the "Reivman Settlement"), paying the class $35.5 million in exchange for their agreement to drop the action and cease opposition to the release. The settlement did not purport to create new bond obligations.

The CSXT bonds at issue in *Adams v. CSX Transportation, Inc.* have a history similar to the Railroad bonds. In 1899, the Columbus, Hocking Valley & Toledo Railway Company issued $20 million in bonds containing gold clauses that governed payment of the interest and the principal. In 1930, Hocking Valley merged into the Chesapeake & Ohio Railway ("C&O"). In 1987, C&O and CSXT, both of which were wholly owned by the CSX Corporation, merged, leaving CSXT as the surviving entity. CSXT executed a Supplemental Indenture in satisfaction of the original Hocking Valley Mortgage Agreement's requirements, in which it agreed to "assume the due and punctual payment of the principal and interest of all the Bonds issued under [Hocking Valley's first mortgage] according to their tenor . . . ." Approximately $15.8 million of the original Hocking Valley Bonds remain outstanding.

In 1933, Congress passed a Joint Resolution ("the 1933 Statute") providing that any obligation containing a gold clause "shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts." Ch. 48, 48 Stat. 112, 113 (1933) (formerly codified at 21 U.S.C. § 463). The statute gave the obligor the option of paying its debts in any form of legal tender, including gold, and prevented any obligee from enforcing gold clauses in existing or future obligations. The Gold

Reserve Act of 1934, however, foreclosed the obligor's option of paying in gold by banning the use of gold as legal tender. *See* Gold Reserve Act of 1934, ch. 6, 48 Stat. 340 (1934) (repealed). From 1933 forward, the railroads made the interest payments on their bonds in currency.

In 1977, Congress amended the 1933 Statute by providing that it did "not apply to obligations issued on or after the date of enactment of this section." 91 Stat. 1227, 1229 (1977). The 1933 statute and its amendment were then recodified in 1982 as follows:

> An obligation issued containing a gold clause or governed by a gold clause is discharged on payment (dollar for dollar) in United States coin or currency that is legal tender at the time of payment. This paragraph does not apply to an obligation issued after October 27, 1977.

31 U.S.C. § 5118(d)(2). In 1985, Congress reauthorized the use of gold coin as legal tender when it provided for the minting of $50 "Gold Eagle" coins. *See* Gold Bullion Coin Act of 1985, Pub. L. No. 99-185, 99 Stat. 1177 (codified as amended at 31 U.S.C. § 5112 (1994)).

Adams filed these two class actions in the district court in 1993. In *Adams v. Burlington Northern Railroad*, No. 94-35461, Adams sought a declaration that the original terms of the bonds, requiring payment of annual interest and principal at maturity in gold coin of the time (1896 and 1921), are enforceable. Adams also sought damages accruing from the Railroad's failure to pay interest in gold coin from the time any new obligations issued, as determined by the court, to the present. The district court dismissed the action for failure to state a claim upon which relief could be granted. Fed. R. Civ. P. 12(b)(6), and found that the Railroad also had met its burden for a grant of summary judgment under Fed. R. Civ. P. 56.

Adams brought his second class action, *Adams v. CSX Transportation, Inc.*, No. 94-35618, on behalf of all Hocking Valley gold bondholders. He sought a declaration that CSXT must make all future interest and principal payments in gold coin of the time (the year 1899) and damages for CSXT's failure to pay interest in gold from the time of the 1987 merger with C&O until the time of the judgment. The district court dismissed Adams' action for failure to state a claim under Fed. R. Civ. P. 12(b)(6).

Adams appeals from the district court's dismissal of his claim and summary judgment against him in his action against the Burlington Northern, and from the district court's dismissal of his action against CSXT.

ANALYSIS

I. *Adams v. Burlington Northern Railroad*

A. Standard of Review.

Adams contends that the district court's dismissal of his claim under Fed. R. Civ. P. 12(b)(6) was improper because the court considered material beyond the pleadings, and that the Railroad's motion should have been treated as a Rule 56 motion for summary judgment. We assume for purposes of decision that the district court entered summary judgment, and affirm on that basis. We review summary judgments de novo, viewing the evidence in the light most favorable to the non-moving party, to determine whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *Warren v. City of Carlsbad*, 58 F.3d 439, 441 (9th Cir. 1995), *cert. denied*, ___ U.S. ___, 116 S. Ct. 1261, 134 L. Ed. 2d 209 (1996).

B. The 1933 Statute and the 1977 Amendment.

Adams contends that the district court erred in determining that the 1933 Statute continues to render unenforceable gold clauses embodied in obligations issued before October 27, 1977. We reject that contention.

As now codified, the 1933 statute and its 1977 amendment are clear on their face.[1] Obligations payable in gold are discharged by payment in any United States legal tender, but that command does not apply to obligations issued after October 27, 1977.

The legislative history of the 1977 amendment supports this plain meaning. Senator Helms, sponsor of the bill amending the 1933 Statute, stated that the bill would "make enforceable, gold clause contracts entered into after the enactment of the bill. It is intended to stand neutral with regard to the enforceability of gold clause obligations issued in the past." 123 Cong. Rec. 633, 635 (1977). Senator Helms was aware of pending cases which were to decide the amendment's effect on pre-1933 gold bonds, and he stated his intent to allow courts to resolve that issue. *See id.* Almost immediately, one of the gold clauses in issue in this case was held unenforceable in *Feldman v. Great Northern Ry. Co.*, 428 F. Supp. 979 (S.D.N.Y. 1977). *Feldman* held that gold bonds issued prior to 1933 still could be paid "dollar for dollar, in legal tender of the United States," and need not be paid in gold. *Id.* at 987.

According to Adams, the 1933 Act (at least when combined with the 1934 abolition of gold as legal

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[1] The 1933 statute and the 1977 amendment were equally clear as separately enacted; the 1982 recodification was not intended to effect any substantive changes. *See* H.R. Rep. No. 651, 97th Cong., 2d Sess. 1-4 (1982), *reprinted in* 1982 U.S.C.C.A.N. 1895, 1895-98.

tender) created an impossibility defense to the payment of gold to the bondholders. He argues that the 1977 Amendment and the 1985 Act authorizing the use of gold as legal tender revoked this "impediment," reviving the Railroad's obligations. This interpretation conflicts with the plain meaning of the 1933 statute. That statute does not simply forbid payment in illegal tender; it affirmatively authorizes payment in any tender legal at the time of payment. Indeed, gold was legal tender in 1933 and did not become illegal until enactment of the Gold Reserve Act of 1934, 48 Stat. 337, 340 (1934). The 1985 statute removes the barrier of the 1934 Act, but it does nothing to impair the 1933 statute. The effect of the 1985 statute is to permit the Burlington Northern to make payment in gold coins if it wishes to, but its debts are discharged if it pays in any legal tender. Section 5118(d)(2) so states.

C. Adams' Claim that the Bonds Were Issued After October 27, 1977.

Adams argues, in the alternative, that for purposes of the 1977 amendment the Railroad bonds were "issued" after October 27, 1977. He contends that sale and transfer of the bonds, as well as certain business transactions and reorganizations, such as mergers and a change in the security for the bond debt, effected a new issuance of bonds after 1977. Adams' claim raises a question of statutory interpretation regarding the meaning of the term "issued" in the 1977 Amendment.

The 11th Circuit has held that a lease obligation is "issued" within the meaning of the 1977 amendment when the lease is "entered into." *Rudolph v. Steinhardt*, 721 F.2d 1324, 1330 (11th Cir. 1983); *see also* 123 Cong. Rec. 635 (1977). In the context of bonds, the term has a similar and even better-understood meaning. A bond obligation is "entered into," or "issued" when the bond first "comes into the hands of a holder, so executed and delivered as to bind the obligor." 6A

Fletcher Cyc. Corp. § 2688 (1989). While the "date of issue . . . usually means the arbitrary date fixed as the beginning of the term for which [the bonds] run," "in the sense in which the term [issued] is ordinarily used a bond is not issued until it is delivered to some one who claims it as a debt against the corporation." *Id.* Under Article 3 of the Uniform Commercial Code, which covers negotiable instruments, "an issue means the *first delivery* of an instrument to a holder or remitter." *Id.* Article 3 of the Uniform Commercial Code applies by analogy to bonds. *Id.* We adopt this interpretation and hold that bonds are "issued" within the meaning of the 1977 amendment when they are delivered to the first holder.

The Alaska Supreme Court has interpreted the meaning of "issued" in the 1977 Amendment in accordance with this ordinary understanding of the term. *See Gold Bondholders, Etc. v. Atchison, Topeka & Santa Fe Ry. Company*, 649 P.2d 947 (Alaska 1982). *Gold Bondholders* was an action brought by persons who in 1980 had purchased railroad bonds with gold clauses. *Id.* at 948. The railroad had originally issued the bonds in 1895. *Id.* The bondholders argued that the bonds had not been "issued" to them until they were delivered to them in 1980, so that the 1933 Act and 1977 amendment did not prevent them from enforcing the gold clauses. *Id.* at 950. The Alaska Supreme Court held that the gold clauses were unenforceable under the 1933 Act, explaining that it "[knew] of no authority which would consider each purchase of the bond after its first purchase to be a new issue of the bond." *Id.*[2]

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[2] The bonds at issue in *Gold Bondholders* contained terms stating that the bonds were transferable, and that any purchaser could surrender the bond and that "a new registered bond will be issued to the transferee in exchange therefor." *Id.* The Alaska Supreme Court nonetheless found that the 1933 Act was intended to vitiate such obligations "insofar as they required payment in

Taking a different tack from that of the plaintiffs in *Gold Bondholders*, Adams frames his argument in terms of novation, arguing that the new obligations to pay in gold arose after October 27, 1977. He argues that because a novation may result from the agreed substitution of an obligee on indebtedness, novations and, consequently, new issuances, occurred each time gold bonds were purchased and sold. This argument misunderstands the requirements for a novation,[3] and is inapposite in the context of bond obligations. Adams' novation argument is essentially the same as the argument that the Alaska Supreme Court rejected, and that we also reject for the same reasons. The date of issue of bonds is the date when they are *first* issued, not when they are resold.

Adams argues that novations also occurred when the Railroad undertook a Supplemental Indenture after a corporate reorganization in which it changed its name, and when it undertook Supplemental Indentures after several other mergers, some of which involved the substitution of different collateral to secure the debt. In support of his argument, Adams points to cases in which novations rendered gold clauses in leases enforceable. *See, e.g., Wells Fargo Bank v. Bank of America,* 32 Cal. App. 4th 424, 38 Cal. Rptr. 2d 521 (1995), *Fay Corp. v. BAT Holdings I, Inc.*, 646 F. Supp. 946 (W.D. Wash. 1986), *aff'd sub nom. Fay Corp. v. Frederick & Nelson Seattle, Inc.*, 896 F.2d 1227 (9th Cir. 1990).

Our response to this argument is much the same as our response to the contention that the sale of a bond

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gold specie," and was unpersuaded that the bonds were first issued to the bondholders in 1980. *Id.* at 950-51.

[3] Novations generally require that the parties intend to extinguish the old obligation and to create a new obligation. 66 C.J.S. *Novation* § 11(b)(1). *See also MacPherson v. Franco*, 34 Wash. 2d 179, 208 P.2d 641, 642 (1949).

constitutes a novation and new "issue." The date of issue of a bond is the date of first issue; the fact that the obligor has continued to be bound, or has agreed to continue to be bound, despite reorganizations and mergers, does not alter the controlling first issue date. Whatever may be the rule regarding transfer of leases, bonds must continue to be viewed as issued on the date of first issue. *See Wells Fargo*, 38 Cal. Rptr. 2d at 528 n. 5 (stating that novation doctrine applicable to leases would not apply to bonds). For purposes of the 1977 amendment, determinations regarding the issuance date of a bond should "[focus] on the legal structure of the bonds and not novation." *Id.* (citing *Gold Bondholders,* 649 P.2d at 950).

If either the sale of bonds, or the merger of the obligor with an agreement to honor outstanding bonds, were to effectuate a new issue of the bonds, the prospective nature of the 1977 amendment would be almost entirely defeated in the major area of corporate bonds. It was the intent of the 1977 amendment to remain "neutral" concerning bonds issued prior to 1977, not to render virtually all of them payable in gold, which would be the effect were Adams' doctrine of novation applied to bond obligations. Moreover, the issuance of corporate bonds is subject to a well-developed, specialized body of law, and the general law of novation is not easily injected into that context. Although sometimes described as a specific type of contract, bonds are financial instruments inherently different from leases, which were at issue in the cases that Adams cites. Bonds are regularly sold and purchased in large, impersonal markets, by corporations that frequently undergo corporate changes, while leaseholds generally involve a small number of readily ascertainable and stable parties who can engage in the type of bargaining and mutual consent necessary for a novation. *See* 66 C.J.S. *Novation* § 8(b) (1950) ("the same parties necessary for the making of the original contract are essential to the making of the contract of

novation"); *see generally*, 66 C.J.S. *Novation* §§ 8-21 (1950). We are unable to accept the view that Congress intended to alter so radically the obligations of bonds that have been in public circulation for nearly a century, when the language and history of its amendment suggests a contrary purpose. We conclude that none of the theories of novation advanced by Adams are sufficient to cause us to recede from the view that the Railroad's bonds were "issued" on the date of first issue, in 1896 or 1921, as the case may be.[4] They consequently are subject to the 1933 state and may be paid with any legal tender.

D. Adams' Additional Claims.

Adams also contends that the 1933 Statute was unconstitutional. This issue has been litigated repeatedly and resolved; Congress's abrogation of the gold clauses was constitutional. *See Norman v. B. & O. R.R. Co.*, 294 U.S. 240, 316, 55 S. Ct. 407, 419, 79 L. Ed. 885 (1935) (finding that Congress acted within the scope of its Constitutional powers in enacting the 1933 Statute); *Guaranty Trust Co. v. Henwood*, 307 U.S. 247, 259, 59 S. Ct. 847, 853-54, 83 L. Ed. 1266 (1939) (holding that the 1933 Statute did not offend the Fifth Amendment); *Feldman v. Great N. R.R.*, 428 F. Supp. 979, 982, 984

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[4] Even if novation analysis were appropriate, the circumstances surrounding the corporate transactions in this case would not meet the formal requirements for a novation. Under Washington law, which applies in this case, a novation requires the substitution of a new obligation for an old one, and not merely a new paper or note. *Davis v. Gutheil*, 87 Wash. 597, 152 P. 14, 16 (1915). All of these Supplemental Indentures expressly indicated a continuity of the original obligations to the bondholders, the old obligations were never extinguished, and no new obligor was substituted.

Adams also contends that the Reivman Settlement constituted a novation. Again, there was no new bond issuance because the Railroad did not undertake any new debt obligation.

(1977) (holding that the 1933 Statute still applied even after the emergency prompting it had abated).

Adams' argument regarding the Railroad's breach of an implied duty of good faith and fair dealing is misguided. The 1933 Act authorized the Railroad to discharge its bond obligations by payment of any legal tender; it did not create an "impediment" to payment which the Railroad had any good faith obligation to avoid. The Railroad was legally excused from meeting its original obligations under the gold clauses and remains so.

We have reviewed Adams' other arguments and find them to be without merit. We affirm the district court's judgment dismissing Adams' action against the Burlington Northern. Adams did not demonstrate that there are any disputed issues of material fact regarding whether the Railroad's bonds were first issued in 1896 and 1921, respectively. Nor did Adams demonstrate that additional discovery could lead to evidence raising a triable issue.

II. *Adams v. CSX Transportation, Inc.*

We review de novo the district court's Fed. R. Civ. P. 12(b)(6) dismissal of Adams' suit against the CSXT. *Stone v. Travelers Corp.*, 58 F.3d 434, 436-37 (9th Cir. 1995).

Adams' claim against CSXT fails for the same reasons as his suit against the Railroad. There was only one issuance of Hocking Valley bonds, at the time of their sale in 1899. These original debt obligations continued, and were assumed in their entirety, by CSXT. The original Hocking Valley Indenture specified that in the event of a merger the successor corporation would assume the same obligation as the original obligor. No new debt was created, and the only relevant "obligation" for purposes of the 1977 Amendment was that which

arose upon the issuance of the Hocking Valley bonds in 1899.

The 1933 Act bars the enforcement of the gold clauses in the CSXT bonds. We thus affirm the district court's dismissal of Adams' claim for failure to state a claim.

CONCLUSION

We affirm the district court's dismissal of Adams' claims in both *Adams v. Burlington Northern Railroad*, No. 94-35461, and *Adams v. CSX Transportation, Inc.*, No. 94-35618, because the gold bonds in both cases were "obligations issued" prior to October 27, 1977. Accordingly, the 1933 Act bars the bondholders from enforcing the gold clauses against the obligors.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

GUY D. ADAMS, et al., Plaintiffs, v. CSX TRANSPORTATION, INC., a Virginia corporation, Defendant.	NO. C93-1827C ORDER ON MOTIONS

The matter is before the court on defendant's motions to dismiss for failure to state a claim and to dismiss for lack of personal jurisdiction. Having reviewed all the documents, heard oral argument, and being otherwise fully informed, the court finds and rules as follows:

I. Facts

In 1899, the Hocking Valley Railway Company issued Consolidated Mortgage Bonds ("Bonds"). Approximately $15.8 million dollars of the Bonds remain outstanding. Under the terms of the Bonds, the obligor promised to pay principal and interest when due, and upon the maturity date, July 1, 1999, in gold. In 1930, Hocking Valley merged into the Chesapeake and Ohio Railway Company, ("C&O"). Thereafter, C&O executed a Supplemental Indenture to the Bonds

assuming Hocking Valley's obligation to pay interest and principal on the Bonds in gold.

In 1933, Congress passed the Gold Clause Resolution, 31 U.S.C. § 463, which mandated that gold clauses be payable only in federally issued currency. In 1934, Congress enacted the Gold Reserve Act which banned private ownership of gold. This ban remained in effect until 1977 when Congress reauthorized the use of gold clauses for obligations issued after October 27, 1977. 31 U.S.C. § 5118.

In 1987, C&O, then a subsidiary of CSX corporation, merged into CSXT, also a subsidiary of CSX Corporation. In 1992, CSXT executed a Supplemental Indenture agreement by which it assumed the obligation to pay the principal and interest on the Bonds.

II. Motion to Dismiss for Lack of Jurisdiction

Defendant moves the court to dismiss the case for lack of personal jurisdiction or to transfer this case to the Eastern District of Virginia pursuant to Federal Rule of Civil Procedure 12(b)(2).

CSXT is a Virginia corporation with its corporate headquarters in the state of Florida. CSXT is engaged in the interstate transportation of freight via its network of railroad lines. While CSXT does not own or lease any railroad lines in Washington, the court finds CSXT's contacts are sufficiently continuous and systematic for this court to exercise jurisdiction over the defendant.

Under Washington's service of process statute, RCW § 4.28.080(10), general jurisdiction is permitted if the nonresident defendant has "substantial" and "continuous" contacts with Washington "of such a character as to give rise to a legal obligation." Amici Egypt Oil Company v. Leones Navigation Company, Inc., 1 F.3d 848, 850 (9th Cir. 1993). This provision permits jurisdiction to the extent permitted by

constitutional due process. Therefore, the court need make only one analysis.[1]

Constitutional due process concerns are satisfied when a nonresident defendant has "certain minimum contacts with the forum such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

Defendant argues that CSXT has only incidental contacts with Washington. CSXT has no agents or employees in Washington, has no property or office here, does not conduct business here, nor is it licensed to do business here.

In applying the minimum contacts test, however, the court finds that CSXT has sent employees to the state of Washington in order to solicit customers, and has continuous and systematic contacts with its regular customers headquartered in Washington. In fact, one of CSXT's employees who works in the Portland, Oregon office lives in Washington state, and frequently visits CSXT's Washington customers. Although CSXT owns no property in Washington, freight shipments are delivered to and from Washington in CSXT freight cars. CSXT also advertises in trade journals that are sold in Washington. Finally, CSXT has availed itself of the protection of Washington law by bringing lawsuits for collection against at least three delinquent customers. When viewed in their entirety, CSXT's activities in Washington are sufficiently continuous and systematic so as to support general jurisdiction. Heliocopteros Nacionales de Colombia v. Hall, 466 U.S. 408 (1984).

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[1] The court finds no difference between the "substantial and continuous" standard set forth in Amici Egypt, and the "systematic and continuous or substantial" test under the due process standard. See, e.g., Heliocopteros Nacionales, 466 U.S. 408 (1984).

The exercise of personal jurisdiction over CSXT is also reasonable. Amici Egypt, 1 F.3d at 851. CSXT does not establish by compelling evidence that the balance of the Amici Egypt factors require dismissal for lack of jurisdiction, or transfer to Virginia. Id. CSXT's corporate predecessors, including the prior obligor on the bonds at issue, maintained an office in Washington and based employees in Washington for over 50 years. CSXT has purposefully interjected itself into Washington state by virtue of the above-mentioned contacts in the state. Since CSXT has an office in nearby Portland, Oregon, and its sister subsidiary, CSXI, has an office in Washington, the burden on CSXT to defend the suit in Washington is not compelling. Furthermore, Washington has an interest in regulating the monetary interests of its resident Bondholders. Finally, with Bondholders residing in different locations across the country, a Washington forum affords as efficient resolution of the dispute as the alternative forum of Virginia, the state of CSXT's incorporation.

Accordingly, defendant's motion to dismiss for lack of jurisdiction is denied.

III. Motion to Dismiss for Failure to State a Claim

Having decided that the court may exercise jurisdiction over defendant, defendant's motion to dismiss for failure to state a claim is properly before the court. Plaintiffs, holders of Bonds for which CSXT is the obligor, have filed suit claiming that CSXT has failed to make payments of interest on the Bonds in gold in accordance with the terms of the Bonds and the post-1977 promise of CSXT to assume payment of the principal and interest on the Bonds.

CSXT has moved the court to dismiss the case under Federal Rule of Civil Procedure 12(b)(6) on the basis that the Bonds were issued before 1977, and 31 U.S.C.

§ 5118 does not create an obligation to pay principal and interest in gold on Bonds issued before 1977.

In considering a motion under Rule 12(b)(6), the court looks first to the complaint, but also may consider documents which are alleged in the complaint and whose authenticity no party questions, even though not attached to the complaint. Branch v. Tunnell, 14 F.3d 449 (9th Cir. 1994). Finding that this case is essentially one of statutory interpretation, and taking plaintiffs' allegations as true, the court concludes that the dispute can be resolved as a matter of law.

The gravamen of this case is whether the 1987 merger and 1992 Supplemental Indenture created a new "obligation issuance" of the Bonds so as to make the gold clause of the Bonds enforceable under the 1977 statute. 31 U.S.C. 5118(d)(2) states:

> An obligation issued containing a gold clause or governed by a gold clause is discharged on payment (dollar for dollar) in United States coin or currency that is legal tender at the time of payment. This paragraph does not apply to an obligation issued after October 27, 1977.

Plaintiffs contend that the 1987 merger and/or the 1992 Supplemental Indenture is an "obligation issued after October 27, 1977." Plaintiffs argue "issued" means "entered into." Plaintiffs rely on the legislative history of 31 U.S.C. § 5118(d)(1) in which Senator Jesse Helms said, "My bill, if approved, will make enforceable, gold clause contracts entered into after the enactment of the bill. . . ." 123 Cong. Rec. 635 (1977).

The court need not look beyond the plain language of the statute, however, to determine the meaning of the word "issue". "Issue" means the first purchase of a bond. Each purchase of a bond is not an issuance.

To hold, as plaintiffs request, that a new issuance occurred after 1977 twists the language of the statute so as to preserve pre-1933 gold clauses. Such Congressional intent is absent both in the 1977 statute and its legislative history. As Judge Dwyer pointed out in facts strikingly similar to the case at hand, "the 1977 statute does not change the effect of the 1933 statute for obligations issued before October 27, 1977 . . . the 1933 statute, which may be summarized as the unenforceability of gold clauses, survives as to all obligations issued before October 27, 1977." Guy and Bonnie Adams et al. v. Burlington Northern Railroad, C93-1590WD (W.D. Wash. April 11, 1994). Because the Bonds were not issued after October 27, 1977, the 1977 statute does not create the legal right for plaintiffs to be paid principal and interest on the Bonds in gold.

Fay Corp. v. BAT Holdings Inc., 646 F. Supp. 946, 949 (W.D. Wash. 1986), aff'd, 896 F.2d 1227 (9th Cir. 1990) is distinguishable from the case at hand. In Fay Corp., the court concluded that a 1982 transfer of a lease was a novation creating a new contract which rendered the lease's gold clause enforceable under the 1977 statute. In this case, the allegations set forth in the complaint do not establish a novation. The 1987 merger and 1992 Supplemental Indenture agreement do not create a new agreement with the Bondholders so as to form a novation. Furthermore, a novation does not occur each time a bond is traded. See, Guy and Bonnie Adams et al. v. Burlington Northern Railroad, C93-1590WD (W.D. Wash. April 11, 1994).

Based on the foregoing, defendant's motion to dismiss for lack of jurisdiction is DENIED. Defendant's motion to dismiss for failure to state a claim is GRANTED. Plaintiffs' motion for summary judgment is STRICKEN as MOOT. This case is dismissed with prejudice.

The Clerk of the Court is directed to enter judgment consistent with this Order, and to send copies of this Order and the judgment to all counsel of record.

DATED this 1 day of June, 1994.

/s/ John C. Coughenour
JOHN C. COUGHENOUR
United States District Judge

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GUY D. ADAMS; HERB BAILEY; BARNTS MEDICAL SPECIALTIES; BENEFIT TRUST LIFE INSURANCE CO.; RUSSELL L. CLARK; DMN, INC.; RAY EIFORD; SHERMAN A. HILL; BRYCE A. JAMES; FRANK C. JONES; ALAN RUSSELL KAHN; ROBERT M. KEENHOLTS; MANHATTAN LIFE INSURANCE COMPANY; STANDARD INSURANCE COMPANY; ELLIS R. STANLEY; TRUSTMARK LIFE INSURANCE COMPANY; UNION CENTRAL LIFE INSURANCE CO.; IRENE E. WALTERS; WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY; JOHN H. ZYBURA, for their own behalf and on behalf of and as Class representatives of all other persons similarly situated, Plaintiffs-Appellants,	CA No. 94-35618 DC No. CV-93-1827-JCC O R D E R

v.)
)
CSX TRANSPORTATION, a)
Virginia corporation,)
)
Defendant-Appellee.)
)

BEFORE: ALARCON and CANBY, Circuit Judges, and FITZGERALD,* District Judge

The panel as constituted in the above case has voted unanimously to deny the petition for rehearing. Judge Canby voted to reject the suggestion for rehearing en banc and Judges Alarcon and Fitzgerald have so recommended.

The full court has been so advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

The mandate shall issue forthwith.

* The Honorable James M. Fitzgerald, Senior United States District Judge for the District of Alaska, sitting by designation.

APPENDIX D

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
Washington, DC 20543-0001

William K. Suter
Clerk of the Court

Area Code 202
479-3011

September 11, 1996

Mr. Donald B. Myers
3600 One Union Square
600 University Street
Seattle, WA 98101-3197

Re: Guy D. Adams, et al.
v. CSX Transportation, Inc.
Application No. A-184

Dear Mr. Myers:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice O'Connor, who on September 11, 1996, extended the time to and including October 22, 1996.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER, Clerk

By /s/ Jeffrey D. Atkins
JEFFREY D. ATKINS
Assistant Clerk

APPENDIX E

First Consolidated Mortgage

$20,000,000

THE HOCKING VALLEY RAILWAY COMPANY

and

THE BUCKEYE COAL AND RAILWAY COMPANY

TO

CENTRAL TRUST COMPANY OF NEW YORK,

Trustee

Dated March 1, 1899

* * *

Know all men by these Presents, That the Hocking Valley Railway Company * * * promises to pay the bearer, or, if registered, to the registered holder of this bond, One Thousand Dollars, in Gold Coin of the United States of the present standard of weight and fineness, on the first day of July, in the year 1999, * * * and to pay interest thereon from July 1, 1899, at the rate of four and one-half per cent. per annum, until the said principal sum shall have been fully paid; such interest to be payable semiannually * * * in like gold coin * * * .

* * *

ARTICLE TEN

Sundry Provisions

SECTION 1. All the covenants, stipulations, promises and agreements in this Indenture contained, by or in behalf of the Railway Company or of the Coal Company, severally and respectively, shall bind such Company, its successors and assigns, whether so expressed or not.

SECTION 2. Nothing contained in this Indenture or in any bond hereby secured, shall prevent any consolidation, or merger of the Railway Company or of the Coal Company with each other or with any other corporation or any conveyance and transfer, subject to the continuing lien of this Indenture and to all the provisions hereof, of all the mortgaged and pledged premises as an entirety to a railroad corporation at that time existing under and by virtue of the laws of any State or States, and entitled to acquire the same; provided, however, that such consolidation, merger or sale shall not impair the lien and security of this Indenture, or any of the rights or powers of the Trustee, or of the bondholders hereunder, and that upon such consolidation, merger or sale, the due and punctual payment of the principal and interest of all of the said bonds according to their tenor, and the due and punctual performance and observance of all the covenants and conditions of this Indenture, shall be assumed by the corporation formed by such consolidation or merger, or purchasing as aforesaid.

APPENDIX F

CSX TRANSPORTATION, INC., SUPPLEMENTAL INDENTURE

This indenture from CSX Transportation, Inc., a corporation of the State of Virginia (hereinafter called "CSXT") to Manufacturers Hanover Trust Company, a corporation of the State of New York (hereinafter called "Trustee"), as Trustee under the First Consolidated Mortgage dated March 1, 1899 (hereinafter called the "Mortgage") of The Hocking Valley Railway Company (hereinafter called "Hocking Valley") and The Buckeye Coal and Railway Company.

WHEREAS CSXT's predecessor, The Chesapeake and Ohio Railway Company (hereinafter called "C&O"), acquired all of the property and assets of Hocking Valley and pursuant to a Supplemental Indenture by and between C&O and the Trustee's predecessor, Central Hanover Bank and Trust Company, dated May 1, 1930, assumed the due and punctual payment of the principal and interest of all of the bonds (hereinafter called the "Bonds") issued under the Mortgage; and

WHEREAS on September 2, 1987 Articles of Merger of CSXT and C&O were filed with the State Corporation Commission of the Commonwealth of Virginia pursuant to which C&O was merged into CSXT; and

WHEREAS CSXT desires to confirm to the Trustee that it has assumed the due and punctual payment of the principal and interest of the Bonds issued under the Mortgage.

NOW, THEREFORE, in consideration of the premises and in fulfillment of its obligations under the Mortgage, CSXT in accordance with the provisions of Article 10 of the Mortgage does hereby assume the due and punctual payment of the principal and interest of all of the Bonds

issued under and secured by the First Consolidated Mortgage of the Hocking Valley Railroad Company according to their tenor and does hereby assume the due and punctual performance and observance of all of the covenants and conditions to be performed and observed by Hocking Valley and C&O under the Mortgage.

IN WITNESS WHEREOF, each of the parties hereto have caused this Indenture to be signed by one of its Vice Presidents and its corporate seal to be hereunto affixed and attested to by an Assistant Secretary as of September 2, 1987.

CSX TRANSPORTATION, INC.

ATTEST:

By: /s/ Patricia J. Aftoora
Vice President

/s/ [Illegible]
Assistant Secretary

MANUFACTURERS HANOVER TRUST COMPANY

ATTEST:

By: /s/ W.B. Dodge
Vice President

/s/ [Illegible]
Assistant Secretary

STATE OF MARYLAND)
to wit:
CITY OF BALTIMORE)

I hereby certify that on this 4th day of March, 1992, before me, the subscriber, a notary public of the State of Maryland, in and for the City of Baltimore, personally appeared Patricia J. Aftoora, Vice President of CSX Transportation, Inc. and made oath in due form of law that the matters and facts set forth in the indenture are true to the best of her knowledge, information and belief.

As witness, my hand and notarial seal.

/s/ Karen Luebehusen
Notary Public

My Commission expires: 10/1/93

STATE OF NEW YORK)
to wit:
CITY OF NEW YORK)

I hereby certify that on this 11th day of March, 1992, before me, the subscriber, a notary public of the State of New York, in and for the City of New York, personally appeared W.B. Dodge, Vice President of Manufacturers Hanover Trust Company and made oath in due form of law that the matters and facts set forth in the Indenture are true to the best of his/her knowledge, information and belief.

As witness, my hand and notarial seal.

/s/ Alicia Castille
Notary Public

My Commission expires:
[stamp]